Supp. Buss Decl.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON (Pendleton)

LEAGUE OF WILDERNESS DEFENDERS/BLUE MOUNTAIN BIODIVERSITY PROJECT, an Oregon nonprofit corporation, Plaintiff, v. UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, and SLATER R. TURNER, District Ranger, Crooked River National Grassland and Lookout Mountain, Ochoco National Forest, in his official capacity, Defendants.	Case No. 2:16-cv-01648-MO October 6, 2016 Portland, Oregon

Preliminary Injunction Hearing

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

FOR THE PLAINTIFF:	Mr. Jesse Buss Attorney at Law 411 5th Street Oregon City, OR 97045-2224
	Mr. Thomas Charles Buchele Earthrise Law Center 10015 S.W. Terwilliger Blvd. Portland, OR 97219
FOR THE DEFENDANTS:	Mr. John P. Tustin Department of Justice Environment and Natural Resources Division P.O. Box 7611 Washington, DC 20044
COURT REPORTER:	Bonita J. Shumway, CSR, RMR, CRR United States District Courthouse 1000 S.W. Third Ave., Room 301 Portland, OR 97204 (503) 326-8188
ALSO PRESENT:	Ms. Rebecca Harrison Ms. Tessa Chillemi

(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time and place set for a temporary restraining order hearing in Case No 2:16-cv-1648-MO, League of Wilderness Defenders/Blue Mountains Biodiversity Project v. the United States Forest Service.

Counsel, can you introduce yourself for the record.

MR. BUCHELE: Good morning, Your Honor. My name is Tom Buchele, appearing for the plaintiff, League of Wilderness Defenders/Blue Mountains Biodiversity Project. I'm joined by my co-counsel, Jess Buss, and by a law student, Tessa Chillemi.

THE COURT: Thank you.

Good morning.

MR. TUSTIN: Good morning, Your Honor. My name is John Tustin on behalf of the federal defendants, and with me today is Rebecca Harris from the Office of General Counsel, U.S. Department of Agriculture.

THE COURT: Thank you both for being here.

I'd like to state my tentative views, and I want to emphasize that they're just that, tentative views, and so if they weren't, we wouldn't be holding this oral argument. But I'm going to do it at some length, in the hopes that it will help you with your oral argument. So you might want to note down positions and questions as we go along.

The parties -- well, the case arises out of the

Forest Service issuing a decision memo authorizing logging or thinning on about a 176-acre parcel around Walton Lake in Central Oregon, the stated bases being it improved public safety and forest health. And plaintiff here claims that this violates both the National Forest Management Act and NEPA, and seeks injunctive relief against the proposed action.

Now, the parties, thank goodness, agree on the standard for an injunction here, since it's a little bit slippery sometimes, but there are the four basic factors: the likelihood of success on the merits, the likelihood of irreparable harm, the balance of equities tipping in plaintiff's favor, and that the injunction would be in the public interest.

And this case may or may not involve the gloss put on that by *Alliance for Wild Rockies* about the balance of hardships tipping sharply in plaintiff's favor, reducing to some degree the showing for success on the merits.

So I'd like to take up each of the four main issues, or you might call them elements a plaintiff has to show to get a preliminary injunction in turn.

The first is likelihood of success on the merits. And I'll just take each of the two theories in order. The first -- well, the basic theory is that the decision was an abuse of discretion principally because it was in violation of law. And so under the National Forest Management Act, the idea

is that there is an existing National Forest Plan for the Ochoco Forest, including this area from 1989. It was amended in '94 and '95 by the Eastside Screens, forbidding logging of trees equal to or in excess of 21 inches unless the Forest Service can rely on an exception established in the Eastside Screens or -- it's also true they can rely on amendment, but that's not our case.

So the Forest Service appears to rely on two exceptions. The first is allowing such harvesting or logging to modify vegetation within recreational special use areas. And as to the National Forest Management Act only, as I understand it, plaintiffs agree that this exception applies to what I'll just call the campground area. And I understand that to be about 69 acres, or about 39 percent of the total amount of logging proposed in the decision memo. And so far, so good, I guess, in terms of putting to bed one part of what is being proposed here.

As to the second exception, the protection of health and safety, this is the exception that it seems like the Forest Service must rely on for removing what I'll call the remaining 61 percent.

Now there's some, I think, inference from the briefing of the United States here that they might want to think of the entire parcel as covered by this exception. And I don't know if that's really being advanced by the United States

or not. That's one of the questions I'll be asking you, is as to the non-campground areas, if we call them that, they've been described by the United States as areas where people are recreating all over the parcel. I don't know if that's just descriptive or if it's an attempt to say that this other exception, the recreational special use area exception, would apply to the entire parcel. Certainly the reply brief, I think, does a good job of rebutting that inference, in terms of the Forest Service's own descriptions of the remaining lots or parcels, but still a question.

But I'm going to operate on the assumption that the Forest Service is relying on the protection -- protecting health and safety exception for the remaining parcels. And so there it's a dispute about what that exception means, almost a textual dispute about what that exception means, and plaintiff says that the exception only applies to public health and safety, not forest health and safety, and cites various reasons for that -- the Forest Service's own positions in the past, its -- that is, the plaintiff's analysis of how that exception would apply to the larger rule, the Ochoco Forest Management Plan, and in particular the Eastside Screens, and other reasons why it contends that the best reading of this text is that it only applies to public health and safety, not forest health and safety.

And the Forest Service disagrees and tries to rebut

some of the historical reasons cited by plaintiff, and gives its own reasons why it thinks that this exception to the Eastside Screens is broad enough to cover forest health and safety.

The main argument here -- I think the key to this point is that the Forest Service accurately cites Ninth Circuit case law to the effect that the Forest Service is entitled to substantial deference to its own interpretation of its own plans and rules. And that's true. And so if this is a dispute about who's got the better reading of the text, then even if I think plaintiffs have a decent reading of the text, so long as the Forest Service also has a plausible reading of the text, then under that substantial deference, plaintiffs would lose.

But what plaintiffs have really tried to show is not so much two competing interpretations, but a flip-flop by the Forest Service on its own reading of its own text. And so if the plaintiff can show that -- that is, if it can show that the current version is a flip from an earlier version -- then I'm not going to give deference to a flip-flop reading of the text. You don't get to read it two inconsistent ways and get deference twice.

So it's really a battle between whether this is just competing definitions of texts, in which case the Forest Service wins, or is it a flip-flop reading of the text, in which case the Forest Service gets no deference for its current

version, and probably therefore the plaintiff at least has a likelihood of succeeding on the merits.

That's what I'll be asking you to address. In fact, why don't we break oral argument up a bit, rather than have you remember both theories in your head all at once. Let's just take this one up first and start with that.

I'll turn to plaintiffs first.

MR. BUSS: Thank you, Your Honor.

For purposes of time limits -- excuse me. For time limitations, should I be aware of a need for purposes of this limited argument?

THE COURT: Don't worry. I'll guide you very carefully as to how much time I need you to spend on anything.

MR. BUSS: Thank you, Judge.

Regarding whether or not the health and safety exception was inferred to apply throughout the entire 176-acre parcel, clearly I do think that was inferred in respondent's brief. However, it is not explicitly stated, and as stated in plaintiff's reply, that was not the justification used in the decision memo. The decision memo cites health and safety only in Units 2 through 4, which are primarily grand fir and Doug-fir, where there is the largest infestation of root rot. The justification for health and safety did not extend to the other units, which were justified on forest health reasons.

Regarding deference to the Forest Service,

plaintiff's position is that it is not a plausible interpretation of the health and safety exception at all, and that even if this was the --

THE COURT: Let's start with that. So you're saying it's not plausible because of the Forest Service history of interpreting or it's not plausible on its face?

MR. BUSS: Your Honor, setting aside the history of interpretation for a moment, the text itself, starting with the 1993 original Eastside Screens, specifically has a parenthetical that explains the scope of the health and safety exception as being limited to roadside or campground hazard trees in a parenthetical. The 1994 amendments simply incorporated the intent of 1993, did not modify the scope of the exceptions at all. The same is true of the 1995 amendments.

If either the 1994 or 1995 amendments had, in fact, intended to expand the scope of that parenthetical permitting it for roadside or campground hazard trees, NEPA would have been required for the impacts, the great scope increase that that would have entailed. But that didn't happen.

Regarding the past interpretation, I believe the Court is referring to Snow Basin and Wolf, which plaintiff cited in both its briefs, and which the defendant did not even attempt to address in its response. And in both of those cases -- and Wolf, which is very recent and is also in the

Ochoco National Forest, involved forest plan amendments specifically for forest health reasons. If the Forest Service could have gotten away without doing a forest plan amendment and all the attendant scoping, research, background information, they would have done so if they could have relied on the health and safety exception, but they correctly recognized in those cases that they could not do so.

In Wolf in particular, there were several site-specific plan amendments, one of which was only 10 acres. This was addressed in plaintiff's reply brief as well. But in the response, defendants hint that this is such a small project here, 176 acres, that it should somehow be exempt as de minimus as well, but Wolf shows to the contrary. There was also a forest plan amendment there that was about 350 acres as well.

THE COURT: I'm not sure -- I mean, I'm not sure what to make of the de minimus argument, but I doubt you rebut it just by saying the Forest Service has previously sought amendments to smaller parcels. I mean --

MR. BUSS: Well, Your Honor --

THE COURT: -- whether you're allowed to make the de minimus argument or not, but if they're not successful, then they have to go through the process.

MR. BUSS: That's true, Your Honor. And, of course, the de minimus doesn't exist, wasn't relied on in the decision memo, so really I add it as a parenthetical.

THE COURT: So your main textual argument, which is where we're starting, is that the text, including the parenthetical, indicates a limitation on this exception for public health and safety.

MR. BUSS: That is half of the textual argument, Your Honor. The context, which goes along with text, is, of course, within the Eastside Screens itself, but in the larger context of the Ochoco National Forest Plan. The specific purpose and primary purpose of the Eastside Screens is to protect forest health, and old growth in particular. So to interpret the text of the health and safety exception as allowing logging on forest health grounds completely swallows the rule.

THE COURT: I'm not sure I've ever really tracked that argument. Why wouldn't it be analytically coherent to say that we have an overall plan that limits logging of these larger trees for forest health purposes but allows the exception when the forest health is specifically in play for some kind of disease?

MR. BUSS: Well, Your Honor, the difference is that the Eastside Screens went through a full NEPA analysis, and they do apply to protectable growth and trees over 21 inches.

THE COURT: Well, the exception went through a full-on NEPA analysis.

MR. BUSS: The exception did, and that's why the exception applies limited to its text. The EAs for both 1994

and 1995 Eastside Screens specifically say that the Eastside Screens are to be interpreted restrictively. Snow Basin and Wolf show that any deviation from that strict requirement requires a forest health plan amendment for a site-specific area.

THE COURT: Sure. That just sort of begs the question. The Forest Service isn't here saying they're seeking a deviation. They're saying that they're operating within the meaning of what was approved in the NEPA process on the Eastside Screens.

MR. BUSS: Yes, Your Honor. However, if an exception to the Eastside Screens' applicability is forest health, and the purpose of the Eastside Screens is to protect forest health and old growth, then in theory the Eastside Screens would never apply in the context of a project designed to improve forest health, which would be most projects.

THE COURT: All right. And then your last point textually is the historical point, right, that the Forest Service has previously read these exceptions -- this exception narrowly?

MR. BUSS: Not explicitly so, but implicitly, yes, Your Honor.

THE COURT: So you've had a chance in your reply to take up the Forest Service's explanations of those historical positions. Anything you wish to add to that?

MR. BUSS: Yes, Your Honor. Simply that we didn't have the opportunity to take up the Forest Service's explanation because they did not attempt to explain the past interpretation at all in their response. So plaintiffs are operating somewhat in a vacuum with regard to that argument because we have not received a response to it.

THE COURT: All right. Thank you.

United States?

MR. TUSTIN: Thank you, Your Honor. Are you able to hear me in the microphone here?

THE COURT: I can hear you just fine.

MR. TUSTIN: I'll begin, Judge, we've discussed a lot about the -- really digging into the forest health exception, but the public health exception clearly applies to the entire project area, including the 61 percent that is outside of the campground concession. And the decision memo and the rest of the record provides ample basis for why the Forest Service determined that this project was necessary to protect the public health, in addition to the forest health, but I'd like to talk about the public health rationale first.

As you mentioned at the beginning, it is located entirely within a developed recreation area. It is the most highly visited area of the forest. The forest plan emphasis for this developed recreation area, MA-F13, is to provide safe, healthful and aesthetic facilities for people to utilize within

a relatively natural outdoor setting while they're pursuing a variety of recreation experiences.

And the treatment options include to direct the Forest Service to utilize all methods to prevent or depress insects and disease outbreaks.

In addition, the recreation report noted that developed recreation sites demand the highest degree of public safety, and the forest health biological evaluation also discussed how forest health and public health are -- how developed recreation sites demand the highest degree of public safety because this is a very small project area. It's only 176 acres.

Let me grab a map. I may have drawn on it inadvertently. Can you ignore the green markings?

THE COURT: I can, but to your right is a menu button and a clear button.

MR. TUSTIN: Thank you. I'll just use my finger to direct it.

The campground concession largely is by Forest Road F220, which is here, but there's also an approximately 300-foot buffer around it. So 61 percent of the area outside of the concession is roughly this perimeter here. But this campground is very small. You have people from the campground who recreate in the entire area all around this -- the developed site. There are trails, such as along here and here, and

people can also wander off woods. So the public safety reasons for why there is an exception are very clear and established in the record.

In addition, the --

THE COURT: Let's slow down for a second here.

MR. TUSTIN: Sure.

THE COURT: So they're clear and established in the record how?

MR. TUSTIN: Because the forest plan direction says the Forest Service must provide safe, healthful and aesthetic facilities for the public to recreate in in this developed recreation area.

THE COURT: That wasn't my question. So that requires a showing by the Forest Service to some degree that that's the sort of area impacted by the decision, and not an area in which people aren't recreating freely. So where in the record do I learn that what you've just told me is true?

MR. TUSTIN: Well, the recreation report discusses -- that's at AR6340. That discusses the recreation of the area. It talks of the entire project area. It's not limited to just the concession. It's talking about the entire project area, including the 61 percent that's outside of the concession. That talks about it.

Also the --

THE COURT: What would prevent that exception from

being used in any area of any national forest? What is the limiting factor?

MR. TUSTIN: The limiting factor here is that this is specifically entirely located within the developed recreation management plan, the management unit of the Forest Service, MA-F13, that we note that it has little applicability elsewhere because this developed recreation area is only 1800 acres, or about .2 percent of the entire national forest. So --

THE COURT: I'm asking the limiting factor. Are you telling me the limiting factor is that if there's such a plan, a developed recreation management plan in place, that's how I can tell where the exception might conceivably apply or where it would not apply?

MR. TUSTIN: Yes. If the project is located within a developed recreation area such as this one, then that is where this exception would be limited to.

THE COURT: And then can you also show me where in the decision memo you relied on this exception versus the other?

MR. TUSTIN: Yes.

THE COURT: For what we call the 61 percent?

MR. TUSTIN: And it's mingled together. The plaintiffs just now alleged that the public health exception applies only to Units 2, 3 and 4, but that's not at all what the decision memo says. On page 6359, we're talking about the

exceptions to the Eastside Screens. It says that it's exempt from the decision because it protects health and safety and develops and modifies vegetation within the recreation special use area. So there's no distinction between the campground concession and the entire project area. And that's evident from the recreation report and from the whole basis for this project and the fact that the very developed nature of the project area receives a very large amount of recreating public.

THE COURT: So your thesis then, if this is true, is in all of this area, there's a risk to public, not just forest but human health and safety, by virtue of falling trees?

MR. TUSTIN: Yes. And -- yes, and because of the falling trees and also because of the dense fuel load that is accumulated in other areas. And, in fact, plaintiffs in their declarations indicate that they recreate throughout the entire project area. Their declarations don't say they're limited to the campground concession. They say they enjoy walking throughout the area. Ms. Coulter's declaration at paragraph 6, Ms. Miller's declaration at paragraph 7, talk about the entire project area. In addition, Mr. Slater, the district ranger, said that people recreate throughout the entire project area. The popularity of the site proves that.

THE COURT: All right. So point number one is you deem the entire area as a recreational special use area?

MR. TUSTIN: No, not entirely.

THE COURT: Isn't that what you have to say to rely on that exception?

MR. TUSTIN: No, because the recreation special use area is limited to the campground concession, but the public health and safety thing applies to the management area, so within this project.

THE COURT: So I think I misunderstood where you were headed with the argument. I think I understood the argument but not your goal. I thought you started out by saying the initial exception as to -- that clearly, or at least plaintiffs agree applies to the campground area, which is the -- to modify vegetation within recreational special use areas applies to the entire area. Is that your position?

MR. TUSTIN: No. The position is -- I apologize if I was not clear. We agree that the recreation special use area is only the campground concession, that 39 percent. But the Forest Service also relied on the protect public health and safety exception for the entire project areas. So the second exception applies to everything, for the reasons stated, because it's a developed recreation area.

THE COURT: And therefore you're relying on both forest health and human health for the entire area?

MR. TUSTIN: Well, we think that the -- we argue that the second exception, the public health and safety exception applies to both public health and forest health. Right now I'm

talking about how it applies to public health, and I can go in and talk about how it applies to forest health.

THE COURT: No, I think I understand where you're headed now.

So what you're really telling me is -- first you're asserting that the exception applies to public health, and that's sort of unexceptional because plaintiffs agree with that. But then you're also asserting that public health is at risk throughout the area, not just forest health.

MR. TUSTIN: Yes. But, again, there are two exceptions that we're relying on, and the second exception is to protect public health, to protect public health and safety. The "public" portion of that applies throughout the entire project area, and that is the basis for this decision. There's also a forest health component.

THE COURT: We'll get to that in a second. Just so I'm clear, though, what plaintiffs have argued is that the public health is only at risk in a campground area, in campground areas. And you're asserting that no, it's at risk in the entire area because people recreate throughout the entire area.

MR. TUSTIN: That is correct, yes.

THE COURT: All right. And then you also assert that in any event, this exception is broad enough to cover forest health in the entire area?

MR. TUSTIN: Yes.

THE COURT: And your textual support for that reading is what?

MR. TUSTIN: The textual support of that reading is in the history of the Eastside Screens amendment. We've discussed in our brief how plaintiffs are relying on a 1993 letter that does contain a parenthetical that is limited to roads and campgrounds. But that parenthetical was not adopted in the 1994 screens. In addition, there is a fourth exception added to that. So that '93 letter may have been a background, it may have provided some information, but that's not what was adopted in 1994.

And furthermore, in 1995, the Forest Service explicitly amended the screens to allow this exception to provide forest health in certain circumstances. And we discussed that how if you don't allow thinning in an old growth area or areas of large old trees, that failure to act provides the very basis that is a threat to the labeled species that are being protected here, the large ponderosa pines.

THE COURT: What do you make of plaintiff's argument that your current position is inconsistent with the positions taken previously by the Forest Service?

MR. TUSTIN: And I believe they're referring to the Wolf EIS and Snow Basin project. Those are completely distinguishable, because in those projects, the Forest Service

was not relying on an exception to the Eastside Screens. There they had done a forest plan site-specific amendment. Here there is no site-specific amendment. We are relying on an exception to the Eastside Screens to allow this project to go forward.

THE COURT: All right. Thank you.

It's plaintiff's burden, so I'll let you reply briefly.

MR. BUSS: Thank you, Judge. Pardon me.

Defendant has just confused and conflated the recreation special uses area, which is the designated campground area, 68.8 acres, with the rest of it, which the forest plan itself, even going back to 1989, defines the MA-F13 developed recreation area as including two distinct sites, the developed site area -- this is at record 1650 -- and separately from that a visual influence area.

There are two different restrictions for logging in those areas. In the developed site area, harvesting is to be for maintaining safe and attractive recreational sites. For visual influence area, which is everything out of the developed site, it is to be done for meeting visual quality objectives and maintaining healthy stands. Nothing about safety there.

THE COURT: I don't think that's the real issue. The issue is that the Forest Service says, and you agree that there is an exception to the Eastside Screens for the protection of

health and safety.

MR. BUSS: Yes, but --

THE COURT: You agree that that applies to protecting, you know, what we'll call human health and safety, public health and safety?

MR. BUSS: To the extent that it covers roadside or campground hazard trees, Your Honor, we do. Because that's the language of the --

THE COURT: That's what you agree on so far.

But the exception is for protecting health and safety. Let's assume that that exception means public health and safety not forest health and safety. That's the core of your position, isn't it?

MR. BUSS: Well, I wouldn't characterize --

THE COURT: It does not cover forest health and safety?

MR. BUSS: Our position is that it does not cover forest health and safety, yes.

THE COURT: The government's main argument is simply that they're not only relying on forest health and safety for this entire area, they're relying on human or public health and safety for the entire area.

MR. BUSS: Yes, Your Honor.

THE COURT: First, before you get into the weeds of your argument, what's your position as to whether that's

factually accurate that, in fact, human health and safety is at risk in the entire area?

MR. BUSS: Your Honor, our factual position on that is that health and safety is only an issue in the area that we are not objecting to logging happening, in the area outside the scope of the preliminary injunction request. And that's supported by the *Field Guide for Hazard-Tree Identification and Mitigation*, which is specifically relied on by the Forest Service, and according to the Forest Service Manual, is the document used to determine whether trees are hazard trees or not.

And the record at page 5553, there's a table that describes the hazard risk for various trees, including live trees and laminated root rot centers, which would be Units -- at least parts of Units 2, 3 and 4. Those score a level 2 out of 4, qualify as a low failure potential if they're greater than 25 feet away from an infected tree, and a medium failure potential if they're closer than 25 feet.

None of those are high failure potential. They don't constitute by themselves a health risk because the chances of someone being outside of the developed recreation area are so small that at the time the tree might fall someone would be standing there.

THE COURT: How do you know that?

MR. BUSS: Well, Your Honor --

THE COURT: Not that the tree might or might not fall, but how do I know the core question, which is are there people regularly present in the areas outside the campground still within the decision memo?

MR. BUSS: I don't think you know that, Your Honor, because the record doesn't support people being in those areas. In the response --

THE COURT: You're saying I don't know one way or the other or do you have facts showing that people are not there? The Forest Service's position is given the nature of this site and its designation, the uses to which it's being put, that a fair inference is that there are people tromping around throughout the area, on trails and all around. Just for purposes of argument, if you take them that far, do you have facts that rebut that?

MR. BUSS: Your Honor, the maps included in the record do not show an extensive trail system through the disputed area. In fact, I do not believe they are there, but certainly not in the highly disputed area where clearcutting is proposed, in Units 2 through 4, there's no evidence of any trails whatsoever off of the main roads. And it's difficult for plaintiffs to prove a negative here, Your Honor, but I'm not aware of anything in evidence in the record supporting trails through those areas.

THE COURT: What about the designation of the entire

area for recreation far above and beyond the national forest itself?

MR. BUSS: I don't believe there's any evidence in the record, Your Honor, also to support that there's higher incidents of use in the --

THE COURT: I'm not now asking about factual incidents of use, I'm asking about what I asked the government to propose as a dividing line between national forest generally and areas where they can claim -- legitimately claim risk to public health.

MR. BUSS: I don't think there is any distinction there, Your Honor. The forest plan itself invites people to recreate throughout the forest. There is no distinction between that and the visual influence area around a developed campground. The public may go anywhere they wish to go in the national forest. It doesn't mean that the Eastside Screens don't apply throughout the national forest.

THE COURT: All right. Thank you.

Let's turn to NEPA. I'll give you my tentative views.

So, as you're aware, the Forest Service applied or sought to apply a categorical exclusion to this proposed action, and plaintiff claims this decision is arbitrary and capricious for two reasons: one, improper scoping; and two, an inappropriate reliance on the categorical exclusion.

So plaintiff has proposed basically three reasons why there was improper scoping: one, that there was an inadequate description of the scale and impact of the activity being proposed, including but probably not limited to failure to disclose the number of trees to be impacted.

Second is that the Forest Service used misleading language, said "thinning" when it really meant a form of clearcutting, et cetera.

The third is that -- this is reliance on the fact that the Eastside Screens themselves say that NEPA and Section 7 must be met even in actions taken under exclusions or exceptions. The third, I guess, has two parts. So 3.1 is a failure to disclose its intention to use the Eastside Screen exceptions to log these 21-inch-or-greater trees. So without pointing that out in the scoping, they get inadequate public response.

And 3.2 is -- I'm not sure this is something plaintiffs are actually relying on or just that it's glancingly mentioned when Section 7 is mentioned, and that is a failure to consult with U.S. Fish and Wildlife as a part of what didn't happen here.

The Forest Service has responded to the first two arguments about essentially the adequacy of their description of their activities, and I think -- tentatively, I think adequately responded to the complaints about the adequacy of

their description, but hasn't responded at all to the third argument in any way. And so I think this issue turns on the Forest Service's response to .3.

I'll turn to the Forest Service first to talk about the categorical exclusion.

MR. TUSTIN: That was disclosed. The plaintiffs claim that the Forest Service must somehow explicitly state in their scoping notice that we are relying on exception to the Eastside Screens. That, I think, is reading too much into the NEPA regulations. The designation for -- the instructions for scoping are to provide the public with notice. The scoping notice clearly says it proposes to remove the host species and to remove trees of all sizes. So if you're removing trees of all sizes, you will be removing trees that are greater than 21 inches.

So we think that that disclosure was sufficient to allow parties to participate, and indeed plaintiffs did have an opportunity and did provide comments about the reliance on the Eastside Screens exceptions. They said you cannot log trees greater than 21 inches. So they provided their views on that, and they were not prejudiced by the Forest Service's disclosure to rely on -- or to indicate that we would be harvesting all species or species of all sizes.

THE COURT: So your principal -- since you didn't specifically reference any exceptions -- correct?

MR. TUSTIN: Correct.

THE COURT: -- you're relying on the fact that when you say "of all sizes," that is a red flag to interested persons, and it must have been enough because it was enough for plaintiffs to know what they wanted to say on this subject?

MR. TUSTIN: Yes. Not just plaintiffs. There were other people that commented, also expressed concerns, but there were also those who supported the proposal and wanted additional logging along Forest Road 22. So there were people that supported and disagreed. It was -- the public had an opportunity to express their views and concerns about removal of trees greater than 21 inches.

THE COURT: What about the Section 7 requirement?

MR. TUSTIN: I don't believe that was fully briefed in plaintiff's brief, but here, the categorical exclusion, one of the steps -- one of the reasons -- excuse me, one of the bases to rely on the categorical exclusions is that there are no extraordinary circumstances here. And there aren't. The Forest Service did do a biological evaluation, and in a decision memo it discusses how consultation was not required because there were not any threatened or endangered species. So that was not necessary.

THE COURT: Thank you.

Go ahead, sir.

MR. BUCHELE: Your Honor, I agree there's not an ESA

issue here, but I think -- I'm not going to give up so easily on this. This is the only scoping issue.

Your Honor, thinning and clearcutting are not the same thing. There is nothing in the scoping notice that put the public on notice that they were going to clearcut 40 acres in a visual enhancement area, and if there had been, there would have been many, many more comments on this issue. They are still posting notices out there with regard to that specific area, calling it thinning. Those are not the same thing.

THE COURT: What do you mean by clearcutting?

MR. BUCHELE: Clearcutting is taking out all the trees, and that is what they're doing. That's what they call it. That's in the record. Internally they called it clearcutting. And those are not the same thing, Your Honor.

THE COURT: And the other argument?

MR. BUCHELE: The other argument is -- and I think that really it comes together with the NFMA argument, Your Honor. The Eastside Screens clearly say you have to comply with NEPA if you're going to use the exceptions. The only chance the public gets to have an involvement in the NEPA process when they're using the categorical exclusion is the scoping notice.

When they were developing the scoping notice, the Forest Service said let's focus on -- get the public to focus

on significant issues. There is nothing more significant in the Eastern Oregon forests than trying to exceed the Eastside Screens limitations.

THE COURT: You heard the main argument, which is that somehow whatever they said was enough to clue you in that you had to object on the basis of failing to follow the Eastside Screens. Why isn't that sufficient under NEPA?

MR. BUCHELE: We knew that they were going to log in excess of the screens. That is certainly true. But we did not -- but, if you notice, my clients still thought they were thinning. That's what it says in the scoping.

THE COURT: That's a different argument. I'm asking you to focus on the NEPA violation, failing to reference the exceptions. If you extrapolate from whatever they may have inadequately said -- let's assume that what the Forest Service does in the abstract is inadequate, but you figure it out and so you make the same objection you would have made had it been adequate. Is that a NEPA violation?

MR. BUCHELE: Under those facts, I don't think it might be, Your Honor, but those aren't the facts.

THE COURT: Setting thinning to one side, didn't you make the same objection -- that is, they're failing to follow the Eastside Screens -- that you would have made had they said, "We're seeking an exception to the Eastside Screens"?

MR. BUCHELE: Not at all, Your Honor, because simply

saying you need to follow the Eastside Screens, which is what our client said, is different from explaining why those exceptions don't apply.

Your Honor, to use the forest health, to use that exception for public health and safety is unprecedented. My client would have submitted lots of evidence if they had tried to do that. They had no idea the Forest Service was trying to use it in that way.

I have seen a lot of scoping notices for timber sales. I've seen a lot of draft EAs and EISes. I have never seen the Forest Service put out a scoping notice when they intended to violate the screens where they didn't explain how they were violating the screens or how they were addressing that.

And, again, public safety, if they were relying on public safety and they were claiming that this entire area was public safety, as you said to Mr. Buss, we would have put in evidence showing that that's not the case here. We had no opportunity to do that, Your Honor, because the scoping notice did not put us on notice on what exception they were using.

That is not an incredible burden. It requires a sentence to do that. And they didn't do that. And there's just really no excuse for that, especially when the screens themselves specifically say if you're going to use the exceptions, you have to comply with NEPA. The only way to do

that here is to list it in the scoping notice. We had no opportunity to put on evidence about the use of the exceptions to allow clearcutting, which is unprecedented, and allow it throughout this area for that kind of thing. That just has never happened before, and our client should have had the exclusive opportunity to address that issue if they were going to do that here.

THE COURT: Thank you.

Would you start with thinning versus clearcutting, and we'll come back to that issue, I guess, since it's been raised again in oral argument. Did you ever use the word "clearcutting" ever?

MR. TUSTIN: Well, that is not what is being proposed. There is --

THE COURT: So the answer to my question is no?

MR. TUSTIN: The decision, the scoping notice is clear of what types of trees are going to be removed. It said it will remove the host species and remove species of all sizes, and explained why it was necessary and where they would be removed, so that the extent of the removal of the Douglas-fir and grand fir was very clear in the scoping notice. Plaintiffs had the opportunity --

THE COURT: Your contention is that the scoping notice puts people on notice that all Doug-firs and grand firs of all sizes would be removed?

MR. TUSTIN: Yes. And it also clarified, the decision memo clarified that -- you know, we talk about clearcutting, people believe that everything is removed. That's not what is happening here. They are removing most, if not all, most of the firs, but they are -- as we discussed in our brief and the decision memo discusses, they are leaving certain clumps further away to provide for diversity. But the vast majority of fir will be removed, but there are some retention groups that are -- that do remain in the project area.

THE COURT: So is that clearcutting or not, in your view?

MR. TUSTIN: That is not clearcutting because you're leaving trees, some trees. But most of it is being removed.

THE COURT: Well, when you say removing Doug-fir and --

MR. TUSTIN: And grand fir.

THE COURT: -- and grand fir. So separate from the retaining clumps you've just described, isn't that de facto clearcutting, where at least that's happening?

MR. TUSTIN: In the comments that's the term, yes, but there will be replanting of resistant species that will provide --

THE COURT: Let me just ask you a question in the abstract. If, in fact, the Forest Service proposes in reality

to engage in clearcutting but describes it in the decision memo as thinning, is that inadequate scoping, just in the abstract? If you're going to clearcut but you say "thinning," is that error?

MR. TUSTIN: I would say yes, but the decision memo does not say that. They talk about how they're removing --

THE COURT: Well, what we have to get at is the ways in which you've adequately described what you were doing beyond just saying "thinning," right? If you just said "thinning," would that also have been inadequate?

MR. TUSTIN: I think it wouldn't because it's talking about the reasons for the thinning and also the removal of the heavily infected species.

THE COURT: So where you get at adequate public notice here is where the decision memo says we're taking out all trees of all sizes of these subspecies of fir?

MR. TUSTIN: That was actually the scoping notice, because the scoping notice did say that, and NEPA does not have -- there's no cutoff date for providing comments. There is a deadline for providing scoping comments, but --

THE COURT: I'm not worried about comments yet. Slow down. I'm trying to get at the adequacy of the scoping notice.

So you're claiming it's adequate by describing that you're taking out all of the two subspecies of fir?

MR. TUSTIN: Yes.

THE COURT: And I suppose your position would be that even independent of the clumps that were left for diversity purposes, the description would nevertheless have been adequate since it's telling people all of the trees are being taken out?

MR. TUSTIN: Yes, it is.

THE COURT: Separate from the clumps, what's left?

MR. TUSTIN: In the Units 2, 3 and 4?

THE COURT: When you're done doing what you propose to do, what's left? What species are left?

MR. TUSTIN: There are -- larch are left, there are some ponderosa pines, conifer -- not as many, there are some. And there will be clumps, as we mentioned. There are larch, there are ponderosa pine.

And then the second portion of the project, which we hope to do in the spring, is to replant with resistant species, to replant with more larch, hardwoods, and some shrubs and bushes that will not only provide future larger trees for them to enjoy and aesthetics, but also they serve as limitations on how the laminated root rot can expand into this developed recreation area.

So as the recreation report noted, the visual impact from Units 2, 3 and 4 is going to be dramatic for the first couple of years, since most of the trees will be removed, but not all. The ponderosa pine and larch remain.

But I also would like to note that the opportunity to

provide comments is not just the written comments. The Forest Service did organize a field trip in August, of mid August, and provided a further opportunity for the public to comment. And that is not at all required, but that provided additional opportunity for plaintiffs to respond.

THE COURT: Thank you.

MR. BUCHELE: Your Honor, if I may.

THE COURT: Yes.

MR. BUCHELE: To respond to Mr. Tustin's last point, there are notes about the field trip in the record. There is no evidence in those notes that the exception to the screens were discussed in any way in that field trip or disclosed to the public.

Just -- this is the notice. This is a one-page notice that was attached to the scoping notice. And it was posted at the campsite. And it says, block 1, "The project would thin Douglas-fir and grand fir." It's quite clear.

This is how the Forest Service --

THE COURT: Why would I care more about that than the scoping notice?

MR. BUCHELE: This was attached to the scoping notice.

THE COURT: Sure, but it's a part of the scoping notice.

MR. BUCHELE: It's a part of it, but that's what the

public saw, and a lot of that is what the public focused on. As I said, my client's response referred to it as thinning.

THE COURT: I'm sorry, did you also see the scoping notice?

MR. BUCHELE: Yes, they saw the scoping notice as well.

THE COURT: Which is a more complete description, correct? It --

MR. BUCHELE: It is a more complete description, Your Honor, but what they described internally is right there. This is a clearcut, and that is not described in the scoping notice, Your Honor.

THE COURT: Well, again, this isn't our case exactly, but if the Forest Service didn't use the word "clearcut" in a scoping notice but said, "We're taking out all sizes of these two species of trees," wouldn't that be adequate even though they didn't actually say the word "clearcut"?

MR. BUCHELE: No, Your Honor, because in context, what they didn't explain was --

THE COURT: I'm not asking about our case.

MR. BUCHELE: Okay.

THE COURT: I gave you a hypothetical.

MR. BUCHELE: I think it depends on the facts, Your Honor.

THE COURT: But the mere absence of the word

"clearcut" isn't fatal, is it, if you otherwise adequately explain it?

MR. BUCHELE: No.

THE COURT: You have to say the word "clearcut"?

MR. BUCHELE: I don't think you have to say the word "clearcut."

THE COURT: Well, that's what I just asked you.

MR. BUCHELE: Right. But what I think you do have to say, though, is the area in which you're taking out all the fir is, in fact, mostly fir. They didn't tell the plaintiff that.

THE COURT: All right. So if you say, "We're taking out all the fir," that might be the inference that, you know, there's a bunch of other trees there, but the public needs to be informed that when we say "all the fir," we mean almost all the trees that are there.

MR. BUCHELE: When you couple it with repeatedly referring to it as thinning, which they did, I think that's very misleading.

THE COURT: All right. Thank you.

I want to be brief about the last issue on likelihood of success, and that's the categorical exclusion for what has been called in the briefs, at least, sanitation harvest.

And there are a series of arguments about why that exclusion really shouldn't apply here, sort of a reprise of the argument made earlier that if the sanitation harvest

categorical exclusion means what the Forest Service now says it means, then it's an exception that swallows the rule.

There's quite a bit of argument about what "adjacent to" really means, and so the Forest Service responds to those in part, but then its main argument really, or at least the one I think has the most strength under Ninth Circuit law is that as to what's needed for a sanitation harvest and, you know, what's necessary or not in terms of creating a buffer of adjacent trees, that the scientists asked this question, having analyzed the threat in this area, and have determined what's necessary to control for disease and spread of insects or disease.

So there's certainly a number of cases that repeatedly counsel district courts in my position not to act as some sort of roving science panel, but why wouldn't that be enough? If the Forest Service has scientific evidence that the proposed action is, in fact, necessary to control the spread of insects or disease, based on what would I say, well, that's probably not going to carry the day?

MR. BUCHELE: Your Honor, that's not enough because that's not what the CE says. If the Forest Service wanted to write a CE that said we can log all 250 acres if necessary for forest health purposes, they should have written that CE. That's not what this one says. It's got language right in the middle that says when you do that, you have to take out

diseased trees or adjacent undiseased trees. It doesn't say you can go in and just decide you're not going to pay any attention to that and just take out the whole unit.

Categorical exclusions --

THE COURT: Just to be clear, the Forest Service as an agency isn't simply saying, well, we just want to take out all these trees. Their position today is we're taking out the number of trees that scientists who have evaluated the area say is necessary to control for disease or insects.

So I'm now supposed to say, well, I know that's -- Let me ask you this in stages. Are you asking me to make any decision based on the assumption that that's going to be shown to be scientifically invalid?

MR. BUCHELE: Our argument here, Your Honor, is not about science. Our argument is about the language of the categorical exclusion. Again, if the Forest Service wanted to write a categorical exclusion that basically left it up to their scientists on what needed to be done within a 250-acre area, they could have done that.

Categorical exclusions are based on the Forest Service's prior history with similar projects. They need to be interpreted narrowly with specific language, because they do short circuit the NEPA process.

There is nothing in this that says that. The CE specifically has language in the middle of it that says,

"including diseased trees and adjacent healthy trees." There's no reason to have that language there if it doesn't mean something and it's not a limiting term.

THE COURT: So you define "adjacent" to be near or close to but not necessarily touching?

MR. BUCHELE: Your Honor, I don't think the Court needs to decide what "adjacent" means.

THE COURT: But I do have to decide that. The Forest Service is saying these are adjacent trees and you're saying they're not adjacent. I don't know how to get out of that box without deciding what adjacent trees are.

MR. BUCHELE: Your Honor, that's actually not the argument they made. The argument they made was the whole unit is diseased so we can just take out everything. But the categorical --

THE COURT: Well, they certainly disagree with your definition of "adjacent."

MR. BUCHELE: They say that language doesn't mean anything, and it's just an example. That's their argument, Your Honor.

And our argument is that language means something and has to be given meaning, and it doesn't mean -- they say that they should be able to log by units or stands under the CE, but again that's not what the CE says.

THE COURT: I want to take up one other issue in the

limited time we have left, and that's the balance of equities and hardships. So I'll just say this about the likelihood of irreparable harm. So this is really a showing plaintiff has to make. It's not so much a balancing as whether plaintiff has shown irreparable harm. And I believe they have here.

I do -- I think there are a couple of predicate issues on irreparable harm. The first that's raised by the government at least is this idea that plaintiff has engaged in delay for the purpose of gaming the system, to gain a tactical advantage. That's focused on the idea that you knew about this in May and filed a lawsuit in the fall, just on the heels of, you know, upcoming winter, changing the whole game.

I've never really gotten from plaintiff an adequate answer to whether you are, in fact, using delay to game the system, but it has precious little to do with irreparable harm anyway. It doesn't mean it's irrelevant. The harms are irreparable or not even when someone is gaming the system through delay, but an injunction is an equitable remedy, and you can seek an equitable remedy with unclean hands if it factors in that way.

And the second, I think, is I just have to look at this as incremental or marginal harms. The plaintiffs want to say here is a site and we're entitled enjoy it as it is now, undisturbed by future action. And that's not quite right because I'm not comparing the site as it is now with the site

as it is after it's completely disturbed by this plan and seeing if there's irreparable harm there. I'm comparing the site as it is following an agreed-upon disturbance of 39 percent or so, and then 100 percent disturbance if the whole thing goes into play.

So it's a bit of a difference at least. I'm not sure it matters a lot, but it's not -- it's not status quo ante versus completely after everything is done. It's rather a comparison between the trees that are going to be taken out near the campsites and roads versus later. In any event, that still leaves, I think, a substantial number of trees that would be downed.

The government has suggested that you can't really make this claim in a managed site. That is, if you want to say we're entitled to a view of the undisturbed forest, that since this is a previously and continuously managed site, that doesn't quite fit here. But I don't think plaintiffs in this situation have to show that they are trying to enjoy sort of a primeval forest. I think you can enjoy a managed forest in its current condition without further cutting and make a claim. All that is by way of my explanation of why I think there's irreparable harm here.

The real ballgame is balance of hardships. The plaintiff doesn't have a lot that it has to offer here. Its hardship is the same as its irreparable harm, the lost trees.

So the Forest Service is the one that has to show, well, this is going to be a hardship on us if we have to wait to see this thing resolved at trial.

So if you didn't have to go to trial, then you'd begin right away, and you'd have certain things done, presumably before the campground opens next spring. If you had to wait until a trial, and you only won this thing in February, then what would the harm be? How would your view on the ground be different in ways that are harmful to your interests if you -- if I gave an injunction and you couldn't move forward on this project until next spring?

MR. TUSTIN: Yes, Your Honor. I believe that the declaration of Mr. Slater lays it out well that if we have to wait until February, this project probably cannot be implemented this year -- in fact, it can't be implemented by this year.

THE COURT: What do you mean by "this year"?

MR. TUSTIN: It would not be implemented prior to the campground being opened in May of 2017.

THE COURT: So your first harm is that you might lose the public's access to the campground next year?

MR. TUSTIN: At least, yes.

THE COURT: You think you might lose it for 2018?

MR. TUSTIN: If we prevail next spring, then they could do it and they would be able to open the campground

likely --

THE COURT: Well, that's my whole analysis. It's not what happens after that. It's what are the shifting positions of the parties after trial. That's what balance of hardships asks me to look at.

So if you have to wait until a trial in February, and you win, what have you lost by not defeating the injunction today? And one is you might have to close the campground in the spring, summer, and fall of 2017, right?

MR. TUSTIN: Yes.

THE COURT: Not '18?

MR. TUSTIN: Yes.

THE COURT: What else?

MR. TUSTIN: Well -- so the implementation of the project would not be able to be done due to the timing. There's the revenue portion, but that is small, $7,000. That, frankly, is not important. We provided that for your information.

In addition, the way the contract is structured, it's an integrated resource contract, where the Forest Service is paying the purchaser to -- or the recipient to do this contract. It is possible the Forest Service could rebid the project, but they have not -- there was only one offer on this one here that it is not certain that the Forest Service would be able to have this done as an integrated resource contract,

where the Forest Service is paying approximately $78,000 to the purchaser to remove the timber and to do all of the additional work. If there was a point in the future, they might be able to, but they may not. And admittedly, that is speculative, but it is important to know that what we have now is an acceptable way to achieve the Forest Service's management objectives, to provide for a safe recreation environment at minimal cost to taxpayers.

THE COURT: So if you lose that, you're saying you might lose this contractor?

MR. TUSTIN: Yes.

THE COURT: And you'd have to replace this contractor with whom or what?

MR. TUSTIN: Potentially another contractor in 2018, or the same contractor. But it's not clear this contract would be able to be agreed upon again in 2018.

THE COURT: Why are we talking about 2018? If you win this case in February, do you turn to this contractor and say, okay, go ahead?

MR. TUSTIN: Well, we would, yes, but he would not be able to do it until the following year, based on his availability of employees or equipment. So they --

THE COURT: You already know if you can't do it this fall, this person cannot do it in 2017?

MR. TUSTIN: I do not know that for certain. So the

contractor could potentially do it in 2017, but again, we've lost the value -- lost a year of recreation.

THE COURT: All right.

MR. BUCHELE: Your Honor, may I respond?

THE COURT: You don't need to.

I'll take a brief break and give you my ruling.

THE CLERK: This court is in recess.

(A recess is then taken.)

THE COURT: Thank you all for your help with this issue. I'm sorry we didn't cover all the issues. There's a limited amount of time and I think we hit the ones I was most concerned about.

As you're familiar, there are four factors I need to take into account. I'm going to work backwards through them.

So one is public interest we didn't talk about, and I consider that something of a wash here between the two parties. If I had to evaluate where the public interest falls, there's really a public interest in keeping this campground open and there's a public interest in the nature of the forest that's being managed here, so I consider that something of a wash.

And as I said, I believe the plaintiffs have made their showing of the likelihood of irreparable harm to them. So that is a factor that tips in plaintiff's favor.

The balance of harms here, balance of equities and hardships, in my view, favors plaintiff. And so the real

question under the *Alliance for Wild Rockies* is does it favor plaintiffs or does it sharply tip in plaintiff's favor. Here, in my view, it sharply tips in plaintiff's favor.

So I'll analyze the remaining factor under that rubric. So if it sharply tips in plaintiff's favor, the plaintiffs have to have raised serious questions that go to the merits. And I believe they have done so here on a variety of issues. I'm not real impressed with the strength of the NFMA argument, given the substantial deference in play and my idea that not much has been shown to make this a true flip-flop, but there are other issues on -- particularly on scoping and the categorical exclusion and its application here or not that I think are, at a minimum, serious questions going to the merits.

If I backed up from that and said, well, it's simply that the balance of hardships favors plaintiff here, then they'd have to show likelihood of success on the merits. And although I'm a little more concerned about that, since I think it's a very close call, I'd grant the injunction on those grounds also, even if I weren't applying the separate rubric of *Alliance for Wild Rockies*.

Therefore, I grant the requested injunction sought by plaintiffs in this case.

I would like to move expeditiously towards a complete resolution of this matter. I don't know if that's better done by allowing you some time to meet with each other and propose a

case schedule or taking that time right now.

Do you have a preference from plaintiff?

MR. BUCHELE: Your Honor, I would like to try to work something out with Mr. Tustin, if we can, and do that within a couple of days, I would hope.

THE COURT: Within two weeks from today, I want the parties to submit a joint proposed case management schedule. Joint proposed doesn't mean I'm forcing you to submit a joint schedule. On anything as to which you disagree, just let me know. I'll either resolve it or get on the phone with you all and then resolve it, depending on the seriousness of the divergence.

Ms. Stephens, that date?

THE CLERK: October 20th.

THE COURT: Anything further from plaintiff today?

MR. BUCHELE: No, thank you, Your Honor.

THE COURT: Anything further from the government?

MR. TUSTIN: No, thank you, Your Honor.

THE COURT: We'll be in recess.

THE CLERK: This court is adjourned.

(Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway *November 9, 2016*

BONITA J. SHUMWAY, CSR, RMR, CRR DATE
Official Court Reporter